CF0000064392

(2)

IN THE HIGH COURT OF JUDICATURE AT JABALPUR

CRIMINAL APPEAL NO. 2554 OF 2000

CRIMINAL APPEAL UNDER SECTION 374 (2) OF CODE OF CRIMINAL PROCEDURE, 1973.

APPELLANT: (IN JAIL) — Mikhail Toppo S/o M.Toppo aged about 48 years, At present in Kanker Jail, R/o Village Timorala, Police Station Jashpur Nagar, Distt. Jashpur Nagar (M.P.)

VERSUS

RESPONDENT: — State of Madhya Pradesh, Through - Police Station Pankhajur, Distt. Kanker (M.P.)

CONVICTION: SENTENCE:

(29)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal NO. 2554/2000

Mikhail Toppo

Vs.

State of Chhattisgah

Judgment for consideration

Sd/-
Dhirendra Mishra
Judge

Hon'ble Shri Justice Fakhruddin

Sd/-
Fakhruddin
Judge

Post for 3 -7-2006

Sd/-
DHIRENDRA MISHRA
Judge

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Ex. P-9 was performed over the dead body of the deceased in the presence of the witnesses after due notices to the witnesses. Blood stained soil and plain soil were seized vide Ex. P-10. A portion of wound in the sealed packet, blood stained pant, shirt, baniyan and one blood stained belt of the deceased were seized vide Ex. P-11. One Beret cap with mono was seized vide Ex. P-12. A memo vide Ex. P-14 was sent to the Executive Magistrate requesting him to remain present during inquest over the dead body. The seized articles – blood stained soils, weapon of offence, etc. were sent for examination to the Forensic Science Laboratory vide Ex. P-15. The accused was arrested on 1-3-1996 at 19.30. After completing investigation, charge sheet was filed in the Court of Judicial Magistrate First Class, Bhanupratappur who in turn committed the case to the Court of Session, Jagdalpur and same was received on transfer for trial by the learned Additional Sessions Judge.

4. Learned Additional Sessions Judge framed charge under Section 302 of Indian Penal Code against the appellant. The appellant adjured his guilt. Prosecution in order to establish the charges against the appellant examined as many as 17 witnesses, thereafter statement of accused under Section 313 of Code of Criminal Procedure was recorded in which the appellant denied the circumstances appearing against him in the prosecution case and pleaded innocence and false implication. He also examined the defence witness No. 1 Kusum Das.

5. Learned Trial Court after hearing the Additional Public Prosecutor and counsel for the appellant convicted and sentenced the appellant as above.

6. Homicidal death of Trilochan is not in dispute. Even otherwise from the evidence of P.W. 1 Dr. M.C. Vyas, who had conducted post

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mortem over the dead body of the deceased and submitted report Ex. P-1 and who had noticed entry wound over the person of the deceased and who had opined that the cause of the death was shock, haemorrhage and injury to vital organs common cause, arch of aorta clot blood found, rupture of right lung and the same was homicidal in nature, homicidal death of Trilochan is established.

7. So far as involvement of the appellant in crime in question is concerned, the learned Court below after recording findings that deceased Trilochan died homicidal death and he died because of bullet injury from riffle and on the basis of eye-witness account given by P.W. 12 Inspector/Company Commander Ramagovind and other material, held the appellant guilty.

8. Learned counsel for the appellant submitted that there is no motive. The prosecution has not established any motive to the appellant for causing death of Trilochan. Admittedly, the incident took place in the dark and as such there was no occasion for eye-witness Ramagovind to witness the incident and this aspect has also been overlooked by the Court below. It is further argued that even as per the prosecution case, at the relevant time, the appellant was discharging his official duty of Guard and in the absence of sanction under Section 197 of Cr.P.C. the whole prosecution is vitiated and, therefore, the impugned judgment cannot be upheld.

9. On the other hand, learned counsel for the State supports the impugned judgment.

10. We have heard the learned counsel for the parties. We have perused the material available on record, oral and documentary evidence as also the impugned judgment.

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11. The 303 riffle and 3 live cartridges and two empties were seized in connected case of murder of Abdul Majid Khan from the custody of the appellant in presence of witness Kusum Das and Preetpal Singh by Sub Inspector K.K. Nag. The seizure memo has been duly proved by P.W. 10 Preetpal Singh who has stated that the weapon of offence and the cartridges were seized from the accused. The statement of this witness finds support by the statement of Sub Inspector K.K. Nag P.W. 8 who had effected the seizure. He stated that in this case, three live cartridges and empties were not seized separately. The seized riffle in connected case was examined by Senior Scientist, Forensic Science Laboratory, Sagar who has given report and opined that the riffle in question was in order, it was recently fired and on comparison, he has further opined that seized empties were fired by the seized riffle. Thus from the above witness, it is proved that the empties which were seized from the appellant were fired from the riffle seized from the appellant. This fact finds further corroboration by the certificate of Ex. P-20 (In S.T. No. 453/96) which shows that the above riffle was issued to the appellant. Dr. M.C. Vyas who has conducted post mortem over the dead body of the deceased and has found injuries as described above, has also stated that in his post mortem report while describing the injuries, he has mentioned that the above injuries were caused by bullet. So far as involvement of the appellant in this offence is concerned, P.W. 2 Shivprasad who has lodged report Ex.P-1 immediately after the incident, has deposed that Trilochan was Guard Commander of his company. Abdul Majid and Trilochan are dead. In the year 1995, he was posted in the place of incident and after the incident he was transferred. He was on duty as rear guard from 12.00 to 2.30 hrs in the night. Before him, Meena Kumar was on duty who had gone to lodge the

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report of first incident to police station and because of first incident, he was in position. At about 12.05 hrs, Mikhail Toppo was coming with riffle. He was ordered to stop whereupon he told his name. Head Constable Trilochan ordered Mikhail Toppo to throw the riffle, however he did not stop and instead fired at Trilochan as a result Trilochan fell there. After Trilochan fell, the accused assaulted him 2-3 times with *butt* of his gun. He directed the accused to stop. He did not stop and went towards hill. Thereafter he along with Bhaiyalal, Major Vedram, M. Bahadur went to police station under alert condition and lodged Ex. P-1. In the cross-examination, he has admitted that when the first incident occurred, he was sleeping in the guard room and therefore, he had not seen the incident. He has denied the suggestion that at the time of incident with Trilochan, he was present in the police station Pakhanjur and said that he was on duty in the rear guard room. P.W. 12 who is the eye-witness has stated that on the date of incident, he was in camp whereas incident took place near P.S. Pakhanjur. In the night he was preparing for meals, he heard sound of firing from police station. Then he along with Platoon Commander Hiralal went to the place from where the sound came. He asked Trilochan about the sound, Trilochan told that accused has escaped after firing at Abdul Majid. Then he informed about the death of Abdul Majid to Station-in-charge K.K. Nag. K.K. Nag also reached to the place of incident. They were asked to take position and the accused who escaped was asked to surrender. Then he (accused) fired at Guard Commandar Trilochan. These witnesses were unmoved in the cross-examination and defence has not been able to elicit anything which makes the evidence of these witnesses untrustworthy or unreliable. The statements of these witnesses further find corroboration from the statement of P.W. 5

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Constable Vedram who has also stated that he was on the night duty on the date of incident along with Meena Kumar, Shivprasad and the deceased constables. Both the deceased constables were sitting beneath Mahua tree whereas he was sleeping in the guard room. At about 8.30 he slept after taking his meals. One hour thereafter Guard Commander Trilochan came there and informed that the accused has fired at Majid and he further stated to take position with your riffle. The accused after the first incident went out of the boundary and after an hour again came to Guard room. He asked Trilochan to give *Bidoria*. When Trilochan said that your *Bidoria* would be with you, then he fired at Trilochan. The statement of above witness is further corroborated by promptly lodged F.I.R. as also from the post mortem report. So far as arguments of the counsel for the appellant that the prosecution has failed to prove motive in the instant case is concerned, it is established law that where there are eye-witnesses to the incident, motive losses all its significance.

12. In the case of Bikau Pandey and others –v- State of Bihar reported in (2003) 12 SCC 616, the Hon'ble Supreme Court has held in para 13 that even if the absence of motive as alleged is accepted, that is of no consequence and pales into insignificance when direct evidence establishes the crime.

13. The second argument advanced by the learned counsel for the appellant that the alleged incident is of the night and, therefore, it was not possible for the witnesses to identify the appellant as perpetrator of the offence. This argument also has no substance inasmuch as the witnesses are constables and company commander in the same company, they were engaged in the night guard duty and familiar with each other. The fire was shot from a close range as stated by P.W. 12. In

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the aforesaid circumstances, the question of identity on the ground that it was night is without any substance and there is evidence available on record to show that at the relevant time, the place was illuminated with electric bulbs. The third argument advanced by the counsel for the appellant that the offence if any is committed by the appellant while he was on duty of the rear guard and as such he could not have been prosecuted without sanction from the competent authority as per the provisions under Section 197 of Cr.P.C. is concerned, the above argument is also without substance because the appellant had left the place after completing his duty. He had handed over his charge to P.W. 17 Constable Meena Kumar and thereafter he came there armed with riffle after obtaining the same from Mess. Even otherwise it was no part of his official duty to fire at his Company Commander and as such the act alleged against the appellant had no nexus whatsoever with his official duty and in the aforesaid circumstances, no sanction as per provisions of Section 197 of Cr.P.C. was necessary for prosecuting the appellant. However from perusal of the record as also from the evidence, we find that this defence was never taken by the appellant during trial and even in the memo of appeal no such ground is there, and same is raised for the first time during argument.

14. Thus on the basis of above discussions, we are of the considered opinion that the prosecution has established the charge against the appellant by adducing reliable evidence and the Court below has correctly held the appellant guilty under Section 302 of I.P.C. and sentenced as above by the impugned judgment.

The appeal fails and is dismissed.

Sd/-
Fakhruddin
Judge

Sd/-
DHIRENDRA MISHRA
Judge

Pathak